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2. Registers, databases and orphan works

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An orphan work[1] is a work still under copyright whose author or right holder remains unidentified or untraceable.[2] Because potential users are required to ask permission to authors or right holders to use their works, they have reached a deadlock. On the one hand, if users decide to use the works, they run a risk because they are likely to be sued for infringement in case the author or right holder reappears. A use of a work without the authorization of its author is infringing. On the other hand, if users give up using such works, one part of our cultural heritage is threatened because works will never be available for the public. Nevertheless, it is absolutely unthinkable to deny copyright. Authors' rights have to be respected.

The alleviation of the orphan works problem supposes to gather information about these works and to facilitate their uses. To this end,

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[1] About orphan works, see notably F.-M. Piriou (2008), 'Orphan works in search of legal solutions', *Revue Internationale du Droit d'Auteur*, **10**(218), 2–110. M.-J. Iglesias (2008), 'Digital Libraries: any step forward?', *Auteurs et Medias*, 2008/5, 345, and M.-J. Iglesias, 'Digital libraries and silent works', paper presented at the Conference on Law & Technology, organized by the InfoSoc Working Group with the department of law of the European University Institute, Florence, October 2008.

[2] See the definition given by the *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works*, European Commission, 2008, p. 9, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf (accessed in January 2010): 'A work is "orphan" with respect to right holders whose permission is required to use it and who can either not be identified or located based on diligent search on the basis of due diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the type of right holder (objectively)'.

the creation of registers seems to be the ideal solution to deal with the orphan works problem. Indeed, in its *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*, 24 June 2008,[3] the Copyright Subgroup of the High Level Expert Group on Digital Libraries advocates the establishment of databases containing information on orphan works. This promotion of register is also mentioned by the Commission in its 2006 Recommendation as a duty of member states to 'improve conditions for digitisation of, and online accessibility to, cultural material by . . . promoting the availability of lists of known orphan works'.[4] The main purpose of registers is to gather and provide information on presumed orphan works. It also has the ambition to facilitate the uses of such works by granting licences and collecting fees. Besides, given that a work is not born orphan but becomes orphan because information is missing or is incorrect, a long-term solution has to be found and implemented to avoid such orphanage context in the future. The idea should be to ask authors to provide information about their works so a user could always know to whom the work belongs and to whom he has to ask permission for using it.

Two kinds of registers emerge: those dedicated to works already supposed to be orphan (I) and those which aim at preventing any work from becoming orphan (II). Both registers – the one dedicated to prevention and the other dedicated to solution – seem to complement each other. An analysis of these two sorts of registers has to be done. Do such mechanisms help or solve, or not, the orphan works problem? What should be the characteristics of the registers?

1. CREATION OF REGISTERS FOR PRESUMED ORPHAN WORKS: A DOWNSTREAM SOLUTION

Orphan works are a real headache for stakeholders and users. In order to alleviate the problem, some European proposals call for the creation of a

[3] *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*, 24 June 2008, available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf (accessed in January 2010). See also, *Final Report on Digital libraries: recommendations and challenges for the future*, December 2009, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/hlg_final_report09.pdf

[4] Article 6 (c) of the Commission Recommendation 2006/585/EC of 24 August 2006 on the digitization and online accessibility of cultural material and digital preservation. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0028:0030:EN:PDF (accessed in January 2010)

register dedicated to presumed orphan works. The idea is to list the different initiatives leading to the creation of registers for presumed orphan works (A). Which aim pursues such a register? Is it well established in order to locate the rights holders, to facilitate the uses of presumed orphan works, to guarantee the uses from an infringement action . . .? This kind of register will need to be evaluated (B).

1.1 European Initiatives

In its *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*, 24 June 2008,[5] the Copyright Subgroup of the High Level Expert Group on Digital Libraries – created to assist the 'i2010: Digital Libraries', a European initiative led by the European Commission – calls for the establishment of databases containing information on orphan works[6] in order to help users in their search. The aim is to improve transparency, facilitate the use of orphan works and gather information about this kind of works. This solution is also advocated by the Commission in its 2006 Recommendation which recommends to member states to 'improve conditions for digitisation of, and online accessibility to, cultural material by . . . promoting the availability of lists of known orphan works'.[7] To this end, the Copyright Subgroup deems essential the interlinking of national databases and registers in order to achieve a common European access point. Therefore, interoperability between those different sources is required. As the Copyright Subgroup and the Commission recommend it, the register of orphan works should be centralized at a European level in order not to increase the cost and time spent by users to obtain information about rights holders of works. It should be held by a public authority in order to guarantee to the maximum the seriousness of the mechanism.

The Copyright Subgroup sets out the key principles for orphan works.[8] It explains that the diligent search has to be carried out by the future user following the due diligence criteria related to the sector concerned. The potential user has to provide evidence of this search. Then, the presumed orphan work could be described in the register 'with whatever metadata (name of the author, producer, title of the work . . .) is available and, in the absence of metadata, makes use of other means to describe the work such as snapshots, facsimile, photo, video clip, excerpt of a piece of music'.

5 See *supra* note 3.
6 See *supra* note 3, p. 11 of the *Final Report* (2008).
7 See *supra* note 4.
8 See *supra* note 5, p. 25 of the *Final Report* (2008).

The name of the user, his intention to use the work and the evidence of his diligent search are registered and publicized in the orphan works database of the Right Clearance Centre (RCC), that assesses whether the search is diligent or not. If so, the RCC informs the user about licensing conditions for the work and grants (or refuses) a licence for a limited period of time. For this license, the user pays a fee and transaction costs to the RCC. Then, the licensing conditions are registered and publicized in the database. If the right holder reappears, the RCC will provide him the collected fees. This information will also be registered in the database. According to the Copyright Subgroup, this orphan works database is 'a register of metadata rather than a works database'.[9]

The recommendation of the Copyright Subgroup has been implemented as a test-base in the ARROW project.[10] The ARROW – Accessible Registries of Rights Information on Orphan Works – project, funded under the eContentplus Programme of the Commission, is a public–private partnership between European national libraries, publishers and collective management organizations.[11] The ARROW project aims to help the EC's i2010 Digital Library Project by finding ways to identify copyright owners and clarify the rights status of a work, in particular if it is orphan.[12] To this end, the ARROW project notably aspires to create European registers of orphan works. This project also wants to establish systems for the exchange of rights data and to support the creation of a network of rights clearance mechanisms,[13] as proposed by the Copyright Subgroup. To reach this objective, the interoperability between several sources of rights information – rights holders, collective management societies, libraries, users – is needed, as well as standards deployment and stakeholder involvement.[14] By delivering an interoperable right information and clearance structure, the ARROW project will enable libraries or any potential user to obtain information about the rights holders of a work and the status of intellectual property rights, the way to contact the owner in order to obtain permission for using the work.[15] The aim of this kind of register is first to help users in their searches, and second to

9 *Idem.*
10 See *supra* note 5, p. 11 of the *Final Report* (2008).
11 http://www.arrow-net.eu/partners (accessed in January 2010).
12 Or if it is out of print.
13 http://www.arrow-net.eu/ (accessed in January 2010).
14 *Idem.*
15 http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex5-final.pdf (accessed in January 2010)

develop a rights clearance procedure and a rights clearance centre to grant licences for the use of orphan works.[16]

Theoretically speaking, a system in which information about uses and works are mentioned by the potential users and not by authors is called a 'reverse registration system'.[17] This mechanism means that there is 'a requirement that people who use works believed to be orphaned register their use and pay a standardized fee into a centrally managed fund'.[18] The public authority 'certifies the statement, but does not issue a license'.[19] Before all, the user is supposed to have conducted a reasonably diligent search of the right holder of the work he wants to use. And only if the right holder cannot be identified or located, the user will be required to pay a statutory fee equivalent to what it would have been if negotiated.[20] A variant of this scheme is that users could register with a licensing agency which 'would provide certification of the use via a limited license and renewal process'.[21]

On the one hand, the creation of a register dedicated to presumed orphan works may be seen as a measure that would help in simplifying the orphan works context. It enables the registration of the users of a work, a 'certain collection for all works'.[22] This kind of registry 'resembles a notice of intent with the exception that no waiting period would be required'.[23] On the other hand, it would be very useful for authors or right holders to know if their works are classified as orphan, and, as a result, to provide the missing information. The aim of such system is first to register the user and the use he intends to do of a work, and second to collect fees. Indeed, this kind of register cannot be limited to identify the right holder. How could we encourage users to register information about a work supposed to be

[16] http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex5-final.pdf (accessed in January 2010)

[17] Darrin Keith Henning (2008), 'Copyright's deus ex machina: reverse registration as economic fostering of orphan works', available at http://works.bepress.com/darrin_henning/1.

[18] *Idem.*

[19] D. Troll Covey (2005), 'Rights, registries and remedies: an analysis of responses to the copyright office notice of inquiry regarding orphan works', in M. Halbert (ed.), *Free Culture and the Digital Library Symposium Proceedings*, Atlanta, GA: MetaScholar Initiative at Emory University, pp. 106–40, available at: http://works.bepress.com/denise_troll_covey/45 (accessed in January 2010), p. 131.

[20] Henning (2008), *supra* note 17, p. 219.

[21] Covey (2005), *supra* note 19, p. 131.

[22] Henning (2008), *supra* note 17, p. 219.

[23] Covey (2005), *supra* note 19, p. 131.

orphan if the aim is not to facilitate its use? Why should they register if the use they want will not be made easier? As explained by Hal R. Varian,

> the seller must have an incentive to enter and update its information in a copyright registry and the buyer must have an incentive to look there. Since the effort cost would be essentially zero and the probability of finding each other would be approximately 1, we could expect that a copyright registry along with a 'diligent search' requirement would come close to solving the problem [of orphan works].[24]

1.2 Evaluation of This Kind of Register

This situation is not without its drawbacks. The system of reverse registration as described looks like a compulsory licence mechanism with the main difference that the user is not sheltered from copyright infringement.[25] Actually, the use of the presumed orphan work is authorized 'under an accommodation that leaves users at risk of the remedies for copyright infringement'.[26] Besides, the compulsory licence would be in breach of Article 5 of the 2001 Information Society Directive[27] which strictly lists exceptions in copyright law. Moreover, the French principle of legality of offences and penalties may not be respected. Nevertheless, as explained by D. Keith Henning,[28] the user benefits from a presumption that the use is legal in case the copyright owner resurfaces and identifies an infringing use of its work. The registration gives users a prima facie evidence of their reasonable diligent searches,[29] a 'sign of good faith'.[30] That is the reason why the registration should be mandatory; users should be forced to post a 'notice of intent'.[31] The burden

[24] Hal R. Varian (2006), 'Copyright term extension and orphan works' (December), *Industrial and Corporate Change*, **15**(6), 965–80, s. 7, available at SSRN: http://ssrn.com/abstract=1116430 or doi:10.1093/icc/dtl026 (accessed in January 2010).

[25] Covey (2005), *supra* note 19, p. 131.

[26] *Idem.*

[27] Directive 2001/29/EC of 22 May 2001 named 'InfoSoc Directive', available online.

[28] Henning (2008), *supra* note 17, p. 219.

[29] Covey (2005), *supra* note 19, p. 131.

[30] *Idem*, p. 130.

[31] *Idem*, p. 130. Nevertheless, the author moderates her though because 'posting a notice of intent to use would be problematic in competitive contexts' to the extent that it 'would make planning difficult, delay preservation of and access to valuable resources, create the potential for illegitimate owners to corrupt the system, and add a step unlikely to connect potential users and rights owners'.

entirely lies on the user. In France, it is true that the counterfeiter may plead his good faith in a criminal court; nevertheless, his good faith will be of no help before a civil court.[32] Indeed, he could only ask for a limitation of damages. Therefore, to pursue damages, the right holder would have 'to overcome the legal use presumption by proving that a diligent search was not performed or that the user fraudulently registered his use'.[33] As a result, the burden remains on the right holder.[34] Besides, in case of a use of a presumed orphan work which is not registered, 'there would be a presumption . . . that the use was intentionally infringing',[35] except if 'individuals who had performed a reasonable search . . . come to an honest belief that the work had passed into the public domain'.[36]

In addition, once a work has been registered in the database as presumed orphan, the risk exists that future potential users will not carry out a diligent search to find the rights holders because it has already been done. It is true that in many hypotheses, 'it would be inefficient to require subsequent users to re-conduct an unsuccessful search performed by others'.[37] Nevertheless, '"piggybacking" may be unacceptable'.[38] The aim is not to perform economies of scale. A potential user should be required to carry out its own diligent search to find the copyright owner. That is why this kind of databases listing presumed orphan works, if their aim is to facilitate their use, must be supported by a legislative solution 'which permits the reutilisation of orphan works on the condition that a reasonable search has been conducted'.[39] The use of an orphan work should not be authorized if the user has not made diligent searches himself.

Moreover, who would be in charge of maintaining this register up

[32] See Piriou (2008), *supra* note 1, p. 52.
[33] Henning (2008), *supra* note 17, p. 219.
[34] Covey (2005), *supra* note 19, p. 131.
[35] Henning (2008), *supra* note 17, p. 219.
[36] *Idem.*
[37] Van Gompel (2007), 'Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?', *International Review of Intellectual Property and Competition Law*, 38(6), 669–702, available at the website, s. 4.2. See also Covey (2005), Institute for Information Law *supra* note 19, p. 131: 'Users can voluntarily register their uses of orphan works, presumably to assist subsequent users – which leads to the issue of piggybacking'.
[38] Van Gompel (2007), *supra* note 37, s. 4.2. See also Covey (2005), *supra* note 19, p. 131: 'Users can voluntarily register their uses of orphan works, presumably to assist subsequent users – which leads to the issue of piggybacking'.
[39] Van Gompel (2007), *supra* note 37, s. 4.2.

to date? The institution which holds it? What would be the uses for the potential users? For instance, 'how much access people would have to images and information on a central register and who would manage the content and also who the end user would be?'.[40] What kind of access would people have? Should any user, whoever he is, be granted a licence to use a presumed orphan work? Should the case of a digital library which does not aim to make economic profits or the case of a user with commercial interest be treated in the same way? We have to take into account that, if the aim of such registers is – or should be – to preserve cultural heritage, a different approach may be taken depending on the user and the use of the presumed orphan work. Therefore, if licences should only be granted to non-commercial uses of works by institutions dedicated to preserve cultural heritage, requiring a fee may become unfounded. Nevertheless, this use remains an infringement. Indeed, many answers remain unsolved. It may be too early for this. Another pernicious effect of a register of orphan works could be that 'potential users could presumably consult this registry to find works available for unauthorized use'.[41]

Furthermore, could the system be successful if authors or copyright owners are not required to check the register or the notice of intent? Could they be forced? As regards the international obligation prohibiting formalities to enjoy and exercise copyright, that is to say Article 5(2) of the Berne Convention,[42] the answer should be negative. The mechanism is a little bit more pernicious to the extent that right holders who want to get their fees back would have no choice but to reappear and claim the money due to them.

Besides, the presumed orphan work may lie in the public domain. By allowing its use under a licence and a payment of a fee, the mechanism creates a new right, not benefiting to the right holder but to the entity in charge of the register. There is a risk that a right which no longer falls within the copyright field emerges from this system. In any case, an ideal situation cannot be reached.

The creation of a register dedicated to presumed orphan works, if it could help solving the orphan works issue, should be accompanied by an upstream solution aiming to avoid a work becoming orphan.

[40] Roxanne Peters, Academic Image Rights Manager at the Victoria and Albert Museum, in the Comments made at the BILETA Conference, 30 March 2009, available at: www.nottingham.ac.uk/Law/Events.aspx (accessed in January 2010)
[41] Covey (2005), *supra* note 19, p. 126.
[42] See developments on this topic below.

2. REGISTERS TO PREVENT WORKS FROM BECOMING ORPHAN: AN UPSTREAM SOLUTION

Our current copyright system is unconditional to the extent that copyright protection emerges without formalities. Indeed, the Berne Convention prohibits submitting copyright to the accomplishment of formalities and this includes registration. Nevertheless, as some consider that the lack of formalities is the cause of the orphan works problem, there is a temptation to come back to mandatory registration formalities to avoid this situation (A). Although a compulsory registration seems to be impossible, a voluntary system may be a good way to reduce orphan works for the future. The aim of such a register could be to provide to users the maximum source of information on a work, including the name of the author or the right holder, the title of the work. Thanks to it, users would be able to identify and locate the copyright owners in order to ask them permission to use their works. That is why a voluntary registration should be considered (B).

2.1 Temptation to Come Back to Mandatory Registration Formalities

Since 1908, the Berne Convention has prohibited any affirmative steps by authors for copyright to emerge. The copyright system is unconditional to the extent that copyright protection is not submitted to formalities (1). Nevertheless, some people deem that the abandonment of formalities as a prerequisite to copyright protection and copyright term extension led to the orphan works problem.[43] So, logically, they advocate a kind of come back to registration formalities with the challenge not to violate Article 5(2) of Berne Convention (2).

2.1.1 The unconditional copyright system

At the very beginning of the intellectual property, some formalities were mandatory to benefit from copyright protection. Those formalities 'generally involved registration (i.e. giving details of the work to a central registering office), deposit (i.e. giving a copy or copies of the work to a central library or depositary) and notice (that is, placing a notice of claim of copyright on copies of the work)'.[44] For example, in France, as required

[43] See notably, Henning (2008), *supra* note 17, p. 206 and following.

[44] J.A.L. Sterling (1999), *World Copyright Law*, London: Sweet and Maxwell, no. 7.17, p. 272.

by Article 6 of the Act of 1793, the copyright exercise (but not its existence) was linked to a deposit of a copy of the work by its author. If the author failed to deposit, he was not able to sue for infringement. This formality was abandoned with the Act of 1925. In Spain, the Act of 1879 required registration of the work and a declaration.[45] If the author did not comply with these formalities, its work fell into the public domain. The legal consequences of a failure to register were different. In France, the formalities were 'only declaratory of the pre-existing natural right of property in a work and had nothing to do with its creation'.[46] In comparison, until 1976 in the United States, authors were required to register to have their works copyrighted.[47] Copyright protection was granted to works if the author registered it with the Copyright Office, deposited a copy with the Library of Congress, provided a notice of copyright including the symbol ©, the year of publication of work and the name of the right holder on the work and renewed registration after a period of time.[48]

In 1908, the Berne Convention integrated Article 4 of the Berlin Act excluding the requirement of any formalities to acquire copyright protection. Since this date, Article 5(2) of the Berne Convention has stated that: 'The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and sueh exercise shall be independent of the existence of protection in the country of origin of the work'. It is forbidden to make copyright protection conditional to the fulfilment of formalities. This result is 'the logical conclusion of a long process of development in which the need for compliance with formalities . . . had been steadily reduced'.[49] The absence of formalities is a 'major advance'[50] of the copyright system. Therefore, all legal systems grant automatically rights to authors. The current system aims to avoid censorship[51] over the

[45] For more examples, see S. Ricketson and J.C. Ginsburg (2006), *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, 2nd edn, 2006, vol. 1, New York: Oxford University Press, no. 1.19, p. 18.

[46] See Ricketson and Ginsburg (2006), *supra* note 45, p. 18.

[47] For a history of formalities, see Genevieve P. Rosloff (2009), '"Some rights reserved": finding the space between all rights reserved and the public domain', *Columbia Journal of Law & the Arts*, 22 July, available at SSRN: http://ssrn.com, p. 5 and following.

[48] Henning (2008), *supra* note 17, p. 221. See also Jerry Brito and Bridget C.E. Dooling (2005), 'An orphan works affirmative defense to copyright infringement actions', *Michigan Telecommunications and Technology Law Review*, **12**, 75, available at SSRN: http://ssrn.com/abstract=942052 (accessed in January 2010), p. 82.

[49] Ricketson and Ginsburg (2006), *supra* note 45, p. 96.

[50] *Id.*

[51] Ch. Caron (2006), *Droit d'auteur et droits voisins*, Litec, no. 112.

emergence of copyright protection. This 'formality-free system'[52] represents a mainstay of the current copyright system. As summarized by Professor Sprigman, 'unconditional copyright grants protection whether or not the work is registered, marked, or renewed. Protection is automatic and indiscriminate, regardless of the will of the author or his assigns'.[53]

As a result, in the United States, between 1976 and 1989, Congress progressively abandoned all formalities in order to join the Berne Convention.[54] To ratify this international text, the United States have had no choice but to give up any formalities conditioning the existence or exercise of copyright. Since the Copyright Act of 1976, every original fixed work in some way has been protected as from its creation. In France for example, according to Article L. 111-1 of the Intellectual Property Code, 'the author of a work shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons'.[55] An author is not obliged to accomplish any formalities to get copyright protection. Copyright automatically emerges from creation. Contrary to the United States, there is no requirement of any fixation of work to benefit from copyright protection.

The international prohibition to condition copyright protection upon formalities does not mean that all formalities are forbidden.[56] What is forbidden is to link the existence and exercise of copyright with registration of works. Although authors are not required to register their works to gain copyright protection, they are encouraged to do so by some national laws,[57] on a voluntary basis, in order to establish a prima facie evidence in case of copyright conflicts. These kinds of register no longer serve to give rise to copyright but are contemplated as a way to better identify the rights holders of a work or prove the ownership. In the United States, registration is recommended to be eligible to statutory damages and attorneys'

[52] Rosloff (2009), *supra* note 47, p. 17.

[53] Christopher Sprigman (2004), 'Reform(aliz)ing copyright', *Stanford Law Review*, 57, 485, 485–568, p. 494.

[54] See J.C. Ginsburg and J.M. Kernochan (1989), 'One hundred and two years later: the US joins the Berne Convention', *RIDA*, 3(141), 57–197.

[55] The French Intellectual Property Code is available at: www.legifrance.gouv.fr (accessed in January 2010)

[56] See Salvador M. Bezos (2007), 'International approaches to the orphan works problem', 27 May, available at SSRN: http://ssrn.com/abstract=989213 (accessed in January 2010), p. 5.

[57] For example, in Spain, every work protected by Law 22/1987, of 11 November 1987, as amended by Law 20/1992, of 7 July 1992, may be registered in the General Registry of Intellectual Property. This register is under the authority of the Ministry of Culture and is made available to the public.

fees, and to be protected against the importation of infringing copies.[58] Registration remains a prerequisite for the author wishing to bring action if its work is of US origin.[59]

Confusion must be avoided about legal deposit. In France, legal deposit is mandatory and required by Article L. 131-1 and following of the Heritage Code. Several kinds of works are required by the law to be deposited in designated public authorities[60] since they have been available to the public.[61] The non-fulfilment leads to penalties. It aims at safeguarding works and may act as an evidence of the date of creation of the work. It is the guardian of the cultural heritage memory. In the United States, the law forces authors whose works are published in the country to make a legal deposit which consists in depositing two copies in the Copyright Office within three months of publication.[62] It has to be understood that the legal deposit does not influence at all the emergence or exercise of copyright protection. Although legal deposit is a mandatory formality required by the law, it is not prohibited by the Berne Convention since it does not condition copyright protection. Besides, as the proof of the determination of the creation date may be difficult to establish, it could be really useful for the authors to voluntarily deposit a copy of their works in a collecting society or an association. This kind of deposit – which is not required by the law – only creates a presumption that could be fought by the contrary evidence.

2.1.2 Current proposals for a mandatory registration of works

Two American university professors – Lessig (a) and Sprigman (b) – think that the situation of orphan works is due to the suppression of formalities requirement. The reason is historical because before the United States joined the Berne Convention in 1988, copyright was linked to the accomplishment of registration formalities by the authors. As a result, it is hardly surprising that they recommend a sort of come back to registration formalities. Even if this tendency has not, yet, really emerged in European countries, it is worth explaining the current proposals and their refusal.

[58] Rosloff (2009), *supra* note 47, p. 4.

[59] Sterling (1999), *supra* note 44, no. 7.17, p. 272.

[60] In France, the Institut National de l'Audiovisuel (INA), the Centre National du Cinéma et de l'Image Animée (CNC), and the Bibliothèque Nationale de France (BNF) are in charge of the legal deposit.

[61] The French Act of 2006 extended the legal deposit to softwares and databases: see Emmanuel Dreyer (2006), 'La réforme du dépôt légal', *Communication Commerce Electronique*, November, Study no. 32. See also Valérie Game (2006), 'Le dépôt légal des œuvres numériques', *Recueil Dalloz*, no. 31, 2191.

[62] See 17 U.S.C. s. 407 (2000).

(a) Professor Lessig's proposal: explanation and refutation To solve the orphan works problem, Professor Lessig's proposal[63] which led to the proposed Public Domain Enhancement Act – in a few words – calls for a mandatory registration of works and a payment of $1 fee after 50 years from the first publication, and every ten years after. If works are not registered, they fall into the public domain and can be used without the rights holders' permission. They are subject to a payment of a licensing fee which will be registered by the government with the other information related to the work – that is, a kind of notice, so that a potential user could easily find information on a work. As a result, any works which are not registered belong to the public domain.

However, this mandatory registration as a prerequisite to copyright protection would have contravened Article 5(2) of the Berne Convention.[64] Indeed, it is forbidden to link registration formalities and use of enjoyment and exercise of copyright. The fact that copyright protection would have depended on an affirmative step by the authors, even though this is not at the very beginning but later, does not comply with the Berne Convention.

In addition, this proposal is not ideal because there are several reasons why a work would not have been registered. Indeed, the non-registration of a work does not necessarily mean it belongs to the public domain. As explained by J. Brito and B. Dooling, 'that could mean either that (i) the work is not yet 50 years old, in which case the author is not under an obligation to register, or (ii) it is in the public domain either because its term has expired or because the author has failed to pay a tax and register at the 50-year mark'.[65] As a result, the proposal does not succeed to solve entirely the orphan works problem for the future. The solution is unfortunately incomplete and, in any case, does not fulfil the international obligations laid down in the Berne Convention.

(b) Professor Sprigman's proposal: explanation and refutation Professor Sprigman's proposal[66] is a little bit different to the extent that the registration and the notice will be on a voluntary basis. He does not advocate a come back to former formalities as existed before the Act of 1976, but suggests a 'new-style' formalities system in compliance with the international

[63] Lawrence Lessig (2004), *Free Culture: The Nature and Future of Creativity* New York: Penguin Books, pp. 222–23. The proposal is summed up by Brito and Dooling (2005) *supra* note 48, pp. 86–90.

[64] Henning (2008), *supra* note 17, p. 217; Brito and Dooling (2005), *supra* note 48, p. 87.

[65] Brito and Dooling (2005), *supra* note 48, p. 88.

[66] Sprigman (2004), *supra* note 53.

obligations of the United States. To this end, he recommends introducing a new voluntary renewal formality – with the requirement of a notice – which could lead, if it is not done, to a compulsory licence allowing any use of the work by whoever for a fee similar to the market price. The work does not fall in the public domain – as Professor Lessig suggested it – but is subject to a compulsory licence. One of the advantages of this default licence system lies in the fact it 'gives copyright owners the option, at an appropriate point in the life of a work, to decide whether the work warrants the high-cost route of infringement damages, injunctions and customized licenses under current copyright law, or whether it is better served through a lower-cost system of default licensing'.[67] A similar proposal, made by Mrs Rosloff, would be to couple this default licence system with a '"some rights reserved" registration system'.[68] It is a kind of a compromise between a conditional and an unconditional copyright system to the extent that the mechanism 'would allow authors to retain certain rights upon creation while conditioning other rights on compliance with minimally burdensome formalities that include registration and deposit'.[69] The idea is not only to propose a voluntary registration but also to propose several choices of registration depending on the level of protection wanted by the author.[70]

It makes sense to propose a voluntary registration and not a mandatory one. Authors cannot be forced to accomplish steps in order for their works to become copyrighted. Copyright emerges since creation and does not depend on any formalities. As a result, if authors are proposed to voluntarily register their works to gain other advantages not dealing with enjoyment or exercise, the proposal does not contravene Artiele 5(2) of the Berne Convention. So, the question is to know whether the compulsory licence as a consequence of the non-registration deals with copyright exercise or not.

Professor Sprigman argues that what the Berne Convention protects is the right as a way to make profit, and not the right to exclude in itself. Whatever characteristic the right has, exclusive or not, does not matter. What is important is the possibility given by the right to gain an income. Professor Sprigman explains that 'an author who fails to comply with

[67] Covey (2005), *supra* note 19, p. 124. And the author continues: this system 'would promote the enjoyment and exercise of copyright by creating a lower-cost market for works unable to be marketed in the high-cost environment of current copyright law'.

[68] Rosloff (2009), *supra* note 47.

[69] Rosloff (2009), *supra* note 47, p. 3.

[70] Rosloff (2009), *supra* note 47, p. 34.

new-style formalities is merely converting an entitlement that is initially protected by a property right (the right to exclude, realized through injunctions and infringement damages) into an entitlement protected by a liability right (the right to recover revenues from use via a default license)'.[71] Actually, one can argue that this kind of registration is not contrary to Article 5(2) of the Berne Convention because copyright exercise is not denied but only reduced from an exclusive right to a compulsory licence, precisely a default license fee.[72]

Nevertheless, the Berne Convention understands copyright as a property rights system and not as a liability one.[73] Authors are not under constraint to accomplish any formalities to gain exclusive rights on their works. A default licence system acts as a near forfeiture of their rights. Accepting such a system would 'change the paradigm of authors' right'.[74] In addition, in European continental countries such as Belgium or France, and contrary to the United States for instance, the natural rights conception of intellectual property makes compulsory the exclusive nature of the rights devoted to authors since they create. It has to be understood that compulsory licences are the exception to the property rights conception and, as such, are strictly supervised by the Berne Convention under article 9(2). Indeed, states are allowed to limit the exclusive right of reproduction 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'. Except these special hypotheses, any use of a work has to be authorized by its author by virtue of its exclusive right. Because Sprigman's system is a liability one and not a property rights one, it does not comply with the Berne Convention.[75] As a result, because the aim of the voluntary registration of Sprigman's system is to maintain exclusive rights, it deals with exercise of copyright and as such, is contrary to Article 5(2). If the non-compliance of formalities leads to the loss of rights, the mechanism violates the Berne Convention.[76] The mechanism seems to be 'a precondition to full enjoyment and exercise of

[71] Sprigman (2004), *supra* note 53, p. 557.
[72] See Olive Huang (2006), 'US Copyright Office orphan works inquiry: finding homes for the Orphans', *Berkeley Technology Law Journal, Annual Review*, **1**(1), 265, see p. 281, who refers to Creative Commons Comment.
[73] Brito and Dooling (2005), *supra* note 48, p. 93.
[74] F.-M. Piriou (2008), *supra* note 1, p. 89.
[75] Brito and Dooling (2005), *supra* note 48, p. 94.
[76] Brito and Dooling (2005), *supra* note 48, p. 92; Rosloff (2009), *supra* note 47, p. 27.

copyright'.[77] Actually, if the right to exclude others from exploiting the works, guaranteed by the Berne Convention, is threatened, this will be contrary to Article 5(2).

In addition, this default licence system does not help solve the orphan works problem. How could the user locate the rights holder to pay the fee, given that its work is not registered? The proposal does not succeed to better identify or locate the rights holders.[78] Moreover, as for the Lessig proposal, users cannot determine if the non-registered work fell into the public domain or is submitted to a default license.[79] And for the authors, requiring such a registration postulates they are aware of having their works copyrighted. But it seems far from being always the case.[80] And for copyright owners such as publishers, requiring registration would 'perversely encourage publishers to abandon works'[81] because of the burden entailed in registration.

To conclude about these systems which advocate formalities as a prerequisite for enjoying or exercising copyright, and as Professor Ginsburg said, 'orphan works legislation should not occasion back door imposition of formalities that condition the "enjoyment or exercise" of copyright'.[82] Formalities can no longer be a condition to gain copyright protection.[83] Any kind of formalities are prohibited if they aim to grant to authors their rights. Authors cannot be forced to register their works. The only way a register should be built is on a voluntary basis.

2.2 The Choice and Encouragement to a Voluntary Registration of Works

Although a mandatory registration of information about works is not desirable, a registration should be encouraged on a voluntary basis in order to protect authors and works from becoming orphan (1). The ways

[77] Brito and Dooling (2005), *supra* note 48, p. 92.
[78] Brito and Dooling (2005), *supra* note 48, p. 98.
[79] Brito and Dooling (2005), *supra* note 48, p. 98. See also Covey (2005), *supra* note 19, p. 125: 'The default license approach requires knowing the author and date of publication or creation. These will probably be known for new works or relatively recent works, but not necessarily for older works.'
[80] Covey (2005), *supra* note 19, p. 122.
[81] *Idem.*
[82] J. Ginsburg (2009), 'Contracts, orphan works and copyright norms: what role for Berne and TRIPs?', in R.C. Dreyfuss, H. First and D.L. Zimmerman (eds), *Working Within the Boundaries of Intellectual Property*, Oxford: Oxford University Press. Available at SSRN, p. 14.
[83] Brito and Dooling (2005), *supra* note 48, p. 87.

to encourage such voluntary registration will be outlined (2) as well as the kind of information needed (3). Nevertheless, this voluntary registration system carries a risk not to be entirely successful. Additional tools seem to be necessary (4).

2.2.1 Why encourage authors to register their works?

Register and database seem to be interchangeable terms. We can see alternatively both of them to designate the same thing. Nevertheless, there exist differences. On the one hand, a register could be defined either as a way to keep memory about something or to centralize information for the future, as a classification of different information.[84] On the other hand, a database could be seen as 'an integrated collection of logically related records or files consolidated into a common pool that provides data for one or more multiple uses'.[85] A database appears to be easily manipulated. Besides, a register seems more institutional than a database. The main difference between a register and a database seems to lie in the finalities of the two mechanisms. A register is only dedicated to keep memory, whereas a database aims at manipulating the data registered to generate something new. Nevertheless, it is true that the frontier may become unclear. In any case, because cultural heritage means keeping memory through generations, the register seems to be the most appropriate word. It would act as the guardian of our culture, the witness of our past and our present for future generations. At this stage, it could be useful to mention Article 11 of the Convention for the Safeguarding of the Intangible Cultural Heritage[86] which states that countries 'shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage'; in other words, they have the duty to preserve their cultural heritage. As a matter of fact, public authorities have to take measures to guarantee the transmission of works. Among these measures, states parties are required to make an inventory to safeguard this particular heritage.[87] The aim is to create visibility:

[84] See http://fr.wikipedia.org/wiki/Registre (accessed in January 2010).

[85] See http://en.wikipedia.org/wiki/Database (accessed in January 2010).

[86] Convention for the Safeguarding of the Intangible Cultural Heritage (ICH), 17 Oct. 2003, UNESCO. Available online. About this topic, see Toshiyuki Kono (ed.), (2009), *Intangible Cultural Heritage and Intellectual Property, Communities, Cultural Diversity and Sustainable Development*, Antwerpen: Intersentia. See also the Council Resolution C/162/02 of 25 June 2002 on preserving tomorrow's memory – preserving digital content for future generations – which proposes 'stimulating the development of policies for preserving digital culture and heritage, as well as their accessibility'.

[87] Article 12 (1) of the ICH: 'To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated'.

'safeguarding intangible cultural heritage is only possible if the intangible cultural heritage is identified'.[88] If identification is missing, nothing can be done for ensuring the preservation of works. We should keep in mind that encouraging authors to register helps to keep memory for the future.

Proposing to authors that they could voluntarily register their works could be useful and in compliance with the international obligations not to condition copyright protection to formalities. The register should be implemented by copyright law. A study of the United Kingdom, named the 'Gowers Review of Intellectual Property', dedicated developments to the orphan works problem and suggested that 'it would be desirable for the UK Patent Office to host a voluntary register, where rights owners could deposit information as to their location and their named estate, or to provide a portal service for users to access existing private registration scheme'.[89] So, it recommended that '[the] Patent Office should establish a voluntary register of copyright, either on its own or through partnerships with database holders, by 2008'.[90] This supply of information regarding the author and the current right holder of a work[91] may, for sure, facilitate the reuse of the work by any potential users. As explained by Mr van Gompel, the orphan work issue may be weakened if 'more rights management information were made publicly available'.[92] Authors and rights holders may be encouraged to provide copyright information identifying the work and the terms and conditions of the use of the work.[93] By doing so, users could find information about works. A voluntary registration has to be supported because it is the only way to give users information they need and ask permission for using works. Such a register, provided

[88] Steven Van Uytsel and Toshiyuki Kono (2009), 'Inventories as an essential part of the safeguarding process', in Toshiyuki Kono (ed.), *Intangible Cultural Heritage and Intellectual Property, Communities, Cultural Diversity and Sustainable Development*, Antwerpen: Intersentia, pp. 43–50, p. 43.

[89] GOWERS, 'Gowers Review of Intellectual Property', December 2006, http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf (accessed in January 2010), no. 4.101, p. 76.

[90] *Idem*, Recommendation 14b.

[91] Article 7 (2) of the InfoSoc Directive states that 'rights-management information [RMI] means any information provided by right holders which identifies the work, . . . the author or any other right holder, or information about the terms and conditions of use of the work . . . and any numbers or codes that represent such information'.

[92] Van Gompel (2007), *supra* note 37, p. 11.

[93] Van Gompel (2007), *supra* note 37, p. 11, who refers to art. 7(2) Information Society Directive and art 12 (2) WIPO Copyright Treaty.

it is sufficiently encouraged and most authors use it, should alleviate the orphan works problem. By consulting the register, users could know the rights holder of this particular work to the extent information is sufficient. Therefore, if a work is not registered, the user could better evaluate the risk of using a presumed orphan work[94]. But the non-registration of a work does not prevent the potential user from going further and making additional searches to identify or locate the copyright owners.[95] This being said, the creation of a voluntary register, even if it has to be supported, could not solve entirely the orphan works problem.[96] Indeed, if a work is not registered, this does not automatically mean that the work is orphan. The work may be in the public domain or still under copyright.

2.2.2 How to encourage authors to register?

On the one hand, the registration proceedings have to be easy for the authors; otherwise they will be discouraged from registering. First, authors should be authorized to register online and not have to physically go to the authority holding the register.[97] In addition, if registration is too strict, complicated to an extent where only a law professional will be able to understand, it may discourage authors or right holders from registering.[98] On the other hand, to complete the efficiency of the mechanism, the consultation of the registry should be easy for the potential users and provide sufficient information so a copyright owner could be found and located.[99] This kind of registration will be of great interest for the authors in the future. Actually, 'if registries and databases provide ownership information to potential users, then users should also provide usage information to owners who might resurface'. It is called a 'notice of intent to use database'.[100] Besides, 'the use of technologies to facilitate the exchange of information between potential users and copyright owners must be implemented'.[101]

An incentive policy should be put in place to encourage authors to register their works. One has to encourage it 'through educational campaigns aimed at informing the public of the legal and practical benefits

94 Covey (2005), *supra* note 19, p. 122.
95 *Idem.*
96 Bezos (2007), *supra* note 56, p. 11.
97 Rosloff (2009), *supra* note 47, pp. 46–7.
98 Covey (2005), *supra* note 19, p. 122.
99 Rosloff (2009), *supra* note 47, p. 49.
100 Huang (2006), *supra* note 72, p. 283.
101 Huang (2006), *supra* note 72, p. 286.

of registration'.[102] It is the only way authors could be well-informed about copyright and the positive effect of registration for their works. To this end, one could call upon collecting societies' services. They could promote voluntary registration and explain to authors the benefits they could get by doing so, notably avoiding the risk for their work to be marked as orphan.[103] Indeed, copyright owners are not always aware of what copyrighted works belong to them.[104] So the promotion of a registration system has to take care of this essential fact and explain before all what is copyright protection and how it works. In addition, collecting societies may encourage a registration either on their websites or on the public authority website in charge of the register. These societies have databases containing a lot of information about works and their authors. They have to play a role in the mechanism aiming at preventing works from becoming orphans by opening their databases[105] and add them to enrich a centralized register. In any case, the aim is to collect existing registers and centralize them in a single one held by a public authority.

2.2.3 What kind of information, what kind of register?

It seems that a 'web-based, centralized database of all existing registration information should be created'.[106] The first step may consist in digitizing all these data, because for most of them currently, they are only available on-site at the offices.[107] The register should be online and centralized at a European level or at least at a national level and be easily consulted from a European portal. In any case, there is a great need of interoperability in order for the mechanism to be as successful as possible. This centralization should allow 'individuals wishing to use a work . . . more easily refer to these vast collections in tracking down the owner of a work'.[108] In addition, this centralized register would help to reduce the cost and time needed to obtain the relevant information.

Several questions remain. How could we be sure that the person who registers is the current owner of the work? Who will be in charge of controlling information? If proof of ownership or transfer documents were

102 Rosloff (2009), *supra* note 47, p. 45.
103 Bezos (2007), *supra* note 56, p. 22.
104 Covey (2005), *supra* note 19, p. 122.
105 Van Gompel (2007), *supra* note 37, p. 13.
106 Huang (2006), *supra* note 72, p. 278.
107 Huang (2006), *supra* note 72, p. 278, who quoted the Recording Industry Association of America explaining this argument of digitization.
108 Bezos (2007), *supra* note 56, p. 9.

not required, what would prevent fraudulent claims of ownership?[109] We must not forget that the registration proceedings have to be facilitated for the authors. So how could we conciliate an easy registration and legal certainty? In addition, how could the register be in compliance with the data protection legislation? It looks like a real challenge. Indeed, because of these difficulties, in Luxembourg, the proposition to create a Register of Copyright – aiming at constituting a proof of the rights for the owners – was abortive. As explained by the members of the Luxembourg Parliament,[110] the archiving, updating and data protection were really problematic. Furthermore, would it be the role of the public authority controlling the Register to check the condition of originality or the ownership of the work ? These questions did not find any answer; as a result, the Act of 2001 withdrew the legal measures dealing with the Register.

Moreover, information which should be mentioned in the register must not contain any deposit of copies of works. It could be argued that the exercise of copyright is reduced for the authors to the extent that this deposit of copies of works creates a kind of right of access to works for the public.[111] And this is not acceptable. Authors are the only characters benefiting from rights on their works, whereas the public simply gets the possibility to use the work.

2.2.4 A voluntary register: an incomplete solution

The voluntary registration system as described seems not to be sufficient in itself to solve the orphan works problem and may require additional tools to be more successful.

To that extent, a notice should be encouraged; otherwise the user will not know how to initiate his searches. It seems to be a 'good practice to put the copyright notice on authorized copies of the work'.[112] Indeed, 'a registry is only useful if a potential user can track back to the rights holder from notice – like the author's name – on the work itself'.[113] A notice formality can be understood as a copyright notice located in every existing copy of

[109] About these points, see Covey (2005), *supra* note 19, p. 122.

[110] See the Government Bill no. 5128, Suggested Amendments made by the Economy Commission, December 16th, 2003, article I-24°, p. 12, quoted by J.-L. Putz (2008), *Le droit d'auteur au Luxembourg*, Luxembourg: Saint Paul Editors, no.172, pp. 72–3.

[111] Emmanuel Dreyer (2003), *Le dépôt légal, Essai sur une garantie nécessaire au droit du public à l'information*, LGDJ, Bibl. droit privé, tome 391, p. 281.

[112] Sterling (1999), *supra* note 44, no. 7.17, p. 273.

[113] Brito and Dooling (2005), *supra* note 48, p. 83.

a work.[114] The aim is to provide potential users with the information to enable them to search in a register. Indeed, not all copyrighted works, such as photographs, are easily identifiable.[115] So the encouragement of fixing a notice on the works will be of great interest for this kind of works. There may be a way to encourage authors to fix a notice on existing copies of their works and register. Under a 'new affirmative defense to infringement actions'[116] contemplated by J. Brito and B. Dooling, which enables orphan works users – if several conditions are satisfied,[117] on the model of *fair use* – not being subject to liability by claiming a codified orphan works defence in case of litigation. This system could encourage authors to fix information on their works in order to be easily contacted by any potential users. This mechanism increases the incentive to mention information on works. Nevertheless, this kind of incentive will not work in continental Europe because there is nothing similar to the fair use system.

In order to alleviate the problem of orphan works, authors and rights holders could also be encouraged to integrate the rights management information (RMI) in their digital works, a sort of 'metadata tagging'.[118] Indeed, in its *Final Report*, the Copyright Subgroup recommends including rights management information in works available in a digital format.[119] In France, the Conseil Supérieur de la Propriété Littéraire et Artistique, called for the implementation of a preventive policy for orphan works in order to avoid the increase in orphan works.[120] To this end, development and access to information about works must be facilitated. The inclusion of rights management information on digital works seems to be essential. Indeed, a work becomes orphan because information is missing or incorrect. The aim is to systematize the ownership information. Van Gompel suggests that the protection of RMI should be granted only if, first, minimum information concerning the current right holder is provided and, second, this information has been mentioned in a publicly

[114] Brito and Dooling (2005), *supra* note 48, p. 83, footnote 84.

[115] Rosloff (2009), *supra* note 47, p. 49. And the author is optimistic because 'as photo search engines and digital search technologies improve, searching for photographs and other works that do not have identifying tags (such as a known author or title) will become easier'.

[116] Brito and Dooling (2005), *supra* note 48, p. 108 and following.

[117] Brito and Dooling (2005), *supra* note 48, pp. 110–11.

[118] Van Gompel (2007), *supra* note 37, p. 11.

[119] See *supra* note 3, p. 11.

[120] Conseil Supérieur de la Propriété Littéraire et Artistique (CSPLA) (2008), *Commission sur les œuvres orphelines, Rapport*, 19 March, p. 8, available at: http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdfhttp://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf

accessible database.[121] Finally, the deposit of information about works in a register would be the condition for the information to be protected. As Van Gompel said, it seems that this formality does not violate Article 5 (2) of the Berne Convention because it does not condition the existence or exercise of copyright, but only the protection of rights management.[122] According to him this would create an incentive to include rights management information in digital works and to register them. But, as the author noticed it, this will be a solution only for recent works and not old ones.

In conclusion, the creation of registers for presumed orphan works, as recommended by the Copyright Subgroup of the High Level Expert Group on Digital Libraries and the Commission in its 2006 Recommendation, could be a positive step to the extent that they may help identify rights holders and prove the good faith of users about the diligent searches they carried out. Nevertheless, drifts are always possible and may threaten the property right of authors. In any case, this kind of register should be completed by a register dedicated to prevent works from becoming orphan. Because our current copyright system is unconditional to the extent that copyright protection emerges without formalities, a mandatory register is prohibited. But a voluntary register – online and centralized at a European level – should be put in place under copyright law, in order to preserve cultural heritage for future generations. As a result, information on works will be available to users to enable them to ask permission to rights holders to use their works. To this end, an incentive policy should be put in place, notably by the collecting societies. For the system to be the most successful, authors should be asked to provide a copyright notice on their works to enable the user to initiate his searches. They could also be encouraged to integrate the rights management information in their digital works, as the Copyright Subgroup and the French Conseil Supérieur de la Propriété Littéraire et Artistique, recommended.

[121] Van Gompel (2007), *supra* note 37, p. 11.
[122] Van Gompel (2007), *supra* note 37, p. 12.

3. Copyright protection for the restoration, reconstruction and digitization of public domain works

Andreas Rahmatian*

1. RESTORATION AND RECONSTRUCTION OF PUBLIC DOMAIN WORKS

1.1 Types and Grades of Restorative Intervention

Copyright protection of the restoration and reconstruction of works, especially of public domain works, is a controversial matter. One of the pillars of copyright protection, the requirement that the work is original, that is, it originates from the author and does not derive entirely from a pre-existing work (so the UK copyright law for authorial works),[1] or that it is a personal intellectual creation bearing the imprint of the author (so the originality definition in author's rights countries)[2] seems to be undermined by the very idea of restoration. Restoration and reconstruction are conceived of as bringing to life again the pre-existing work, not a new work; they are deliberately designed as being not 'original' – in the way in which a layperson would understand this term. They rather want to be subservient to the previous artist's ideas and conceptions and in line with the epoch in which the work was created, often long after the expiry of copyright, or even well before the advent of copyright. However, copyright protection can exist for the restoration of public domain works, potentially with the unwelcome result that a work in the public domain may in part get

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[1] *University of London Press Ltd.* v. *University Tutorial Press Ltd.* [1916] 2 Ch 601, at 608–09.

[2] See, for example, France: A. Lucas and H.-J. Lucas (2006), *Traité de la propriété littéraire et artistique*, 3rd edn, Paris: Lexis-Nexis/Litec, pp. 72–3; Germany: s. 2 (2) UrhG 1965.